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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 682

DANIEL W. HOAN,

Petitioner,

vs.

THE JOURNAL COMPANY, HARRY J. GRANT AND LAWRENCE C. EKLUND,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN, U. S. A.

PETITIONER'S REPLY BRIEF.

Preliminary Statements.

In this brief we confine ourselves to a reply to Respondents' Brief Opposing Grant of Writ.

The decision of the Supreme Court of Wisconsin, which is set forth at pages 498 to 515 and 517 to 518 of the transcript of the record filed herein, is reported at 238 Wis. 311 and at 298 N. W. 228.

Petition and Record Conform to Rules.

It is respectfully submitted that the petition for certiorari addressed to the Supreme Court of the United States and the transcript of the record conform to the rules of this Court. We forego further argument as to this, as we deem the statements made on pages 2 and 19 of respondents' brief to be waivers of oversights in these respects, if any, as alleged by respondents. No violation of the rules is pointed out specifically. It should be borne in mind that at this stage of the proceedings we are dealing only with an application for a writ of certiorari. We quote from page 19 as follows:

> "We have no objection to having the court determine the right to a review on this printed record; but take this occasion to say that if a writ were granted, we would insist, either that the original record be transmitted, or that the printed record be supplemented by abstracts of certain portions thereof."

If a writ is granted the petitioner will, of course, comply fully with any rule of this Court pertaining to the record and will cooperate to the fullest extent with the respondent in this respect, all to the end that the real issues may be fully and fairly presented to this Court, with brevity.

Petitioner Does Not Charge Judicial Dishonesty.

We quote from page 5 of respondents' brief as follows:

> "Petitioner's claim is tantamount to a charge of judicial dishonesty."

By this is meant "judicial dishonesty" on the part of the Supreme Court of Wisconsin and, it may be, on the part of the Circuit Court of Milwaukee County. In speaking of the trial of the action we cannot exclude the trial in either court. We make no such charge against those courts, or either of

them. If we have unintentionally used any words, written or spoken, or done anything, open to such a construction, and we are confident we have not, we withdraw the same. We respectfully submit that there is nothing in the record to sustain this contention of the respondents.

At page 5 of their brief, respondents argue that "Anything less" than "a charge of judicial dishonesty" "would be insufficient on its face to invoke the jurisdiction of this Court because the Fourteenth Amendment does not guarantee uniformity of decisions or freedom from error." The cases there cited in support of this are, we respectfully submit, distinguishable from the case at bar.

At page 6, respondents argue that petitioner's "grave charge" of "judicial dishonesty" is without support and that no Federal question is presented to give this Court jurisdiction for review. As heretofore stated petitioner makes no charge of "judicial dishonesty" on the part of any court.

Petitioner Charges Error by Wisconsin Courts in Violation of Section 1 of Article XIV of Federal Constitution.

We do respectfully charge that both Wisconsin courts committed error to the prejudice and damage of the petitioner and in violation of provisions of Section 1 of Article XIV of the Federal Constitution, as more particularly pointed out in the petition, brief in support thereof, and this reply brief.

At page 2 of the petition, there is made a charge "of arbitrary invasion of the constitutional rights of petitioner by the Supreme Court of the State of Wisconsin in a case that came before it on appeal from a judgment of the Circuit Court of Milwaukee County" wherein it violated the law of Wisconsin pertaining to jury trials. The law of the State is synonymous with the law of the land. *Hurtado* v. *California*, 110 U. S. 535, and *Walker* v. *Sauvinet*, 92 U. S. 92. This latter case is cited at page 20 of respondents'

brief. Therefore this charge is, in substance and effect, a charge of denial of due process of law, which is guaranteed by Section 1 of Article XIV of the Federal Constitution. At page 2, there is also made a similar charge as to equal protection of the laws. At page 11, it appears, in substance and effect, that all of this Section of this Article has been invoked and relied upon and also specifically the guarantee of the equal protection of the laws contained therein. At page 13, this guarantee is repeatedly invoked and relied on, with an assurance that they will be further considered with authorities in the brief attached to the petition; and the decision of the Wisconsin Supreme Court to the effect that the petitioner was not denied due process of law and the equal protection of the laws under Article XIV of the Federal Constitution is there fully set forth. At pages 15, 16, 17, 19, 20 and 21, the equal protection of the laws provision of this Article and also the petitioner's fundamental and constitutional rights and the whole of the first clause of this Article, which is Section 1, are repeatedly invoked and relied on. The prayer for relief of the petition, at page 22, is broad enough to cover any relief afforded by Section 1 of Article XIV. At pages 31, 36 and 39 of the brief attached to the petition, in keeping with the assurance of the petition, the guarantee of the equal protection of the laws is invoked and relied on and, at page 39, all of section 1 is set forth fully, invoked and relied on. Under its provisions the State of Wisconsin was and is prohibited from (1) abridging petitioner's privileges or immunities, (2) depriving him of life, liberty or property without due process of law, and (3) denying him the equal protection of the laws. Hence, there are presented Federal questions as to all of these prohibitions against the State of Wisconsin.

The foregoing is a complete answer to respondents' contention, at page 6 of their brief, to the effect that petitioner makes no claim of deprivation of property without due proc-

ess of law. There are indications that they are not confident of their position in making this contention since, at page 20 of their brief, they make contentions which are open to the construction that none of petitioner's rights under the Federal constitution have been violated, including his right to due process of law; and they there cite, and quote extensively from, reports of cases containing language which deals specifically with due process of law. It is respectfully submitted that the cases thus dealt with or mentioned in any way at page 20 are distinguishable from the case at bar. There are implications, language and dicta in some of these cases, at least, which tend to support petitioner's position in the case at bar.

Petitioner Deprived of Property in Libel Action at Bar Without Due Process by Wisconsin Courts.

At page 6 of respondents' brief, it is urged that there can be no claim of a deprivation of property without due process of law in a libel action since the action does not involve property. *Abbott* v. *Tacoma Bank of Commerce,* 175 U. S. 409, at 413 and 414, which is the only case cited in support of such contention, is distinguishable from the case at bar; and the court did not reject or disparage the view that reputation is property. In the case at bar, the Circuit Court of Milwaukee County rendered and entered a judgment of $195.58 for costs in favor of respondents and against petitioner and dismissing his complaint on its merits, on October 11, 1940. (Transcript of Record 495-496.) It is respectfully submitted that this $195.58 is property within the meaning of Section 1 of Article XIV of the Federal Constitution. See *Fidelity & Deposit Co. of Maryland* v. *Arenz,* 290 U. S. 66, and Byrnes Law Dictionary, 1923, page 709. Furthermore, the verdict of the jury assessed petitioner's compensatory damages at $10,000 and his punitory damages at $10,000 after making other findings of fact entitling him

to a judgment for these amounts, $20,000 in all. (Transcript of Record 506-507.) Previous to the entry of judgment, stipulations of facts were entered into by the petitioner and respondents, in effect, establishing the falsity of the libelous matter in question and exonerating petitioner from blame for the bombings in question. Such exoneration was too late. The damage was done. (Petition 4-6.) It is likewise respectfully submitted that this $20,000 is property within the meaning of this Section 1. It is also respectfully submitted that the judgment dismissing the petitioner's complaint on its merits and awarding respondents costs payable by him to them in the amount of $195.58 deprived him of property in this amount and in the amount of $20,000, without due process of law.

The Wisconsin Constitution provides as follows:

"ARTICLE I.

Declaration of Rights.

* * * * * * *

Free speech; libel. Section 3. Every person may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right,* and no laws shall be passed to restrain or abridge the liberty of speech or of the press. * * *

* * * * * * *

Trial by jury; verdict in civil cases. Section 5. *The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy;* but a jury trial may be waived by the parties in all cases in the manner prescribed by law. * * *

* * * * * * *

Remedy for wrongs. Section 9. Every person is entitled to a certain remedy in the laws *for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice* * * * *completely and without denial,* * * * *conformably to the laws.*

* * * * * * *

Maintenance of free government. Section 22. The blessings of a free government can only be maintained by a firm

adherence to justice, moderation, temperance, frugality and virtue, *and by frequent recurrence to fundamental principles.*

* * * * * * *

ARTICLE XIV.

* * * * * * *

Common law continued in force. Section 13. Such parts of the common law as are now in force in the territory of Wisconsin, not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the legislature."

We quote from the Wisconsin Statutes, 1939, as follows:

"270.07. Issues, by whom tried, when tried. (1) An issue of fact in an action for the recovery of *money only,* * * * *must be tried by a jury* except as otherwise provided in this chapter and except that equitable defenses or counterclaims are triable by the court. * * *

270.32. Jury trial, how waived. Trial by jury may be waived by the several parties to an issue of fact by failing to appear at the trial, or by written consent filed with the clerk; or by consent in open court, entered in the minutes." (Italics supplied.)

Petitioner did not waive a trial by jury. The respondents *abused* the freedom of the press by libeling petitioner. He was thereby injured and wronged in his person, property and character, for which he sought redress in the courts of Wisconsin. He was entitled to a trial by jury under the law of Wisconsin, constitutional and statutory, which is the law of the land, or due process of law, in the case at bar. He was denied due process of law, in violation of Section 1 of Article XIV of the Federal Constitution, by the denial of his right to a trial by jury in two respects. Two answers made by the jury to questions in the special verdict were changed by the courts and judgment was entered against

him and in favor of respondents, notwithstanding that all of the ten remaining answers made by the jury to questions in the special verdict were permitted to stand, and notwithstanding that it was well established that the defamatory language in question published by respondents about him was false.

Newspaper Article Defamatory and Questions of Verdict for Jury Only.

The language of the newspaper article *charging petitioner "himself" with blame for bombings of Milwaukee's police stations and banks by terrorists* was defamatory. Thus *blaming* petitioner for such *bombings* amounted to charging him with fault and *responsibility* and being *answerable* for these *bombings* and with *wrong* and *culpability* and *accusing* him of them. See Webster's New International Dictionary of the English Language, 1935, at pages 283 and 686; the Oxford English Dictionary at page 125 of Volume 3 and pages 888-889 of Volume 1; Bouvier's Law Dictionary, Rawle's Third Revision, at page 814; and Ballentine's Law Dictionary, 1930, at pages 345-346. These charges made against the petitioner in this libelous newspaper article are most serious charges. They were fully justified in answering all of the questions of the special verdict as they did.

Petitioner was entitled to have these questions of fact, particularly questions 1 and 2, finally answered by a jury of his *peers,* and not by distinguished judges of courts of law highly trained and experienced in the refinements and technicalities of the law. The right of such trial by jury is an ancient and valuable right, sacredly guarded and handed down through the ages. If Wisconsin courts can invade the province of jurors, as was done here, "the law of the land" contained in plain provisions of the Wisconsin Constitution and statutes have no meaning. See *Berry* v. *U. S.,* 312 U. S. 450, and *Conway* v. *O'Brien,* 312 U. S. 492. "Ques-

tions of due process are not to be treated 'narrowly or pedantically in slavery to forms or phrases'." *Pearson* v. *McGraw*, 308 U. S. 313, 318.

Section 1, Article XIV, Federal Constitution, Applicable to Courts of Wisconsin.

The provisions of Section 1 of Article XIV of the Federal Constitution are binding as limitations upon the executive, legislative and *judicial* branches of the State governments and upon agencies of the states *Mooney* v. *Holohan*, 294 U. S. 104.

Petitioner's Invocation of Section 1, Article XIV, Federal Constitution, Timely.

At page 9 of their brief, respondents contend that the raising of a Federal question by petitioner was not timely. The case there cited in support of this contention, *Minnich* v. *Gardner*, 292 U. S. 48, at 53, is distinguishable. The issues of equal protection of the law and due process of law were raised on a motion for rehearing before the Supreme Court of Wisconsin and decided adversely to petitioner. This was the first time that he found that it was necessary to raise them. We respectfully submit that the raising of these questions was timely; and that respondents' contention to the contrary is highly technical and untenable.

Equal Protection of Laws Issue Fully Covered in Petitioner's Brief Submitted With Petition.

In petitioner's brief, submitted with the petition, respondents' argument on the issue of equal protection of the laws was anticipated and dealt with.

Petitioner's Privileges and Immunities Abridged.

Upon the question of abridgement of privileges or immunities, *Walker* v. *Saunivet*, 92 Wis. 92, cited in respond-

ents' brief and dealt with elsewhere in this brief, is distinguishable. We respectfully submit that petitioner's privilege of having a trial of his case by a jury and his right to be immune from damage by libel without redress have been abridged in violation of Section 1, Article XIV, of the Federal Constitution notwithstanding precedents, if any, adverse to petitioner on these issues.

In Conclusion.

We have examined all of the cases cited in respondents' brief and, in connection with them, all of the cases cited in the decision of the Supreme Court of Wisconsin and by the Circuit Court of Milwaukee County; and we respectfully submit that there is nothing in them or in the record to overcome the error here complained of or to prevent the granting by this Court of petitioner's application for a writ of certiorari and that cases tending to the contrary, if any, should be overruled.

Respectfully submitted,

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